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The Reorganization of the German Administration of Justice in 1942

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By the third spring of the war, a critical situation had arisen in the German administration of justice by reason of the conflict between Nazi principles and practices and older standards. One purpose of the Nazis upon their assumption of power in 1933 had been the introduction of a harder and more ruthless justice. Obstacles were encountered, however, such as the penal code (Strafgesetzbuch) of the Second Empire, which remained in force, and the persistence of pre-Hitler officials in the judiciary and the Ministry of Justice, which had been the most reactionary of the ministries under the republic. Pending the completion of new legal codes, the Nazis have sought their ends by devious means, among which the following may be indicated: amendment of the codes by special decrees such as that which recognizes "the sound feeling of the people" (Gesundes Volksempfinden) as a criterion of criminality; control of the legal and judicial personnel through pressure or replacement; the establishment of extraordinary courts with summary procedures (People's Court and Special Courts); the segmentation of justice through creation of special jurisdictions, e.g. party, army and labor courts; and the terroristic operations of the Gestapo.

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The inevitable effect of the war was to sharpen and multiply such instruments of arbitrary justice. New crimes were defined, whether black market operations, listening to foreign broadcasts or consorting with foreign workers. The list of capital offenses lengthened. Meanwhile there remained both officials and judges who strove to maintain something of the standards of justice in which they had been trained before 1933, and for which they found support in the older laws which continued valid. Hence the administration of justice became capricious. Acquittal or conviction and the

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severity of the sentence varied for the same crime from court to court, depending on the judge who tried the case. Variation in judicial interpretation of "sound feeling of the people" was a particular source of unequal justice. Severity and caprice grew, the situation became more difficult, after the death in January, 1941, of the Reich Minister of Justice, Franz Guertner, who as Bavarian Minister of Justice had aided and protected Hitler after the Putsch of 1923. No successor was appointed for nineteen months, the ministry being directed in the interval by Schlegelberger, the Secretary of State.

Judicial resistance, despite the urgency of the military situation, to Nazi demands for greater severity and the resulting growth of inequality in German justice led Hitler in his address of April 26, 1942, to denounce the excessive lenience of German judges. He threatened the removal of those "who do not clearly recognize the demand of the hour" and secured from the Reichstag reaffirmation of his position as Supreme Judge, "unbound by existing legal precepts" (ohne an bestehende Rechtsvorschriften gebunden zu sein). (1) The very sharpness of Hitler's attack confirmed the fact that there were judges who had held fast to the code of law and refused to pronounce the arbitrary judgments which had often been enjoined on them from above.

After Hitler's speech, it was expected that he would at once appoint a successor to Guertner and initiate basic reforms in the administration of justice. But months passed without action being taken. There were two reasons for the delay. In the first place, two extreme Nazis had claims to the ministerial post: Freisler, Secretary of State, representative of the SS and editor of Deutsche Justiz; (2) and Governor General Frank, Leader of the Reich Legal Office of the NSDAP, President of the Academy for German

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(1) Brusseler Zeitung, April 27, 1942.
(2) Freisler has recently presided over trials in which four Alsatians were sentenced to death and twenty-nine to prison terms ranging up to fifteen years (N. Y. Times, March 29, 1943).

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Law and Leader of the NS Association of the Guardians of the Law. In order to avoid offense to either Freisler or Frank by giving preference to the other, Hitler decided in August to appoint a third, Otto Georg Thierack, President of the People's Court.

Not only the personal issue but policy also recommended choice of the comparatively little known Thierack. The speech of April 26th had aroused great concern in juristic circles. It was feared that Hitler would abolish the old legal code at one blow and discharge a large number of meritorious and respected legal officials. But these older judges and attorneys could be dispensed with even less than before the war, since many young jurists had either enlisted or taken one of the numerous new administrative positions. Hitler could not at this juncture afford a conflict with the elders whose administration of justice he had so roughly attacked. A compromise had to be found between the radical Nazi circles about the Fuerher and the more conservative elements. Credit for working out the compromise is attributed to Lammers, Chief of the Reich Chancellery and himself an old civil servant and SS Senior Group Leader.

Thierack personifies the compromise. As an official in the administration of justice since the early twenties he was acceptable to the older, more conservative group. By reason of his support of the NSDAP since before 1933, his unenviable reputation as President of the People's Court from 1936 to 1942, and as SS Brigadefuehrer, he could expect support from the younger and more radical jurists. The career of the new Secretary of State, Curt Rothenberger, had paralleled that of Thierack on a less prominent plane.

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(1) This account has so far rested largely on an unusually well-informed article "Deutsche Justiz 1942" in Die Weltwoche, Zurich, Sept. 4, 1942.

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In order to give his new minister and secretary a fair opportunity, Hitler cleared their path and reduced the influence of the NSDAP on the administration of justice. Freisler was transferred from his secretaryship to the far less influential post which Thierack had vacated. Frank resigned all his offices which were concerned with justice "in order to be able to devote himself completely to his duties as Governor General." The Reich Legal Office of the NSDAP, under Frank an important channel for party influence, was abolished. Thierack's position as Minister of Justice was buttressed by leadership of the Academy for German Law and the NS Association of Guardians of the Law, which he took over from Frank. Moreover, Hitler empowered Thierack "in accordance with my directives and instructions and in agreement with the Reich Minister and Chief of the Reich Chancellery (Lammers) and the Leader of the Party Chancellery (Bormann) to build up a National Socialist administration of justice and to take all necessary steps for this purpose" and in so doing to "depart from existing law." (1)

This authorization, it will be noted, reserved to the NSDAP influence on the administration of justice through the Leader of the Party Chancellery. Taken in connection with the transfer of Freisler and the retirement of Frank, it strengthened the position of Bormann. Yet in and of itself, Bormann's influence was increased little if at all, since a decree of January 16, 1942 had already stipulated that "The party's collaboration in lawmaking takes place exclusively through the Leader of the Party Chancellery so far as the Fuehrer does not determine otherwise." (2)

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(1) Frankfurter Zeitung, August 26, 1942.
(2) State Department, National Socialism (Washington, 1943) pp. 212-3.

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Thierack and Rothenberger have emitted a steady flow of addresses, articles and interviews which often voice so strong a Nazi viewpoint as to obscure the compromise inherent in their appointment. The general tenor of these statements may be summarized as follows: A "crisis" has arisen in the administration of justice because, although National Socialism has created a folk-community (Volksgemeinschaft) since 1933, the legal and judicial system has not freed itself from obsolete principles of individualistic liberalism, which are embodied in the written law. A gulf had widened between the judges and the popular sense of justice. It is necessary that the number of judges be reduced (reduction from 14,000 to 5,000 has been mentioned), that the judges be better paid, and selected and trained with a view to their experience of contemporary life as much as their knowledge of the written law. The system of courts should be reorganized and adapted to the Gaue of the NSDAP. Minor cases, involving less than 500 marks, are to be entrusted to Justices of the Peace (Friedensrichter) who are to be worthy citizens, not necessarily trained in the law. The people are promised a larger share in the dispensation of justice also by restoration of the village and town jurisdiction of olden days in minor cases (Dorf-und Stadtgerichtsbarkeit). The central purpose of these changes is to establish "a National Socialist administration of justice . . . guided solely by the principles of National Socialism."(1) Rothenberger has stated that "the leadership of justice has now been placed directly in the hands

(1) "Rechtspflege aus nationalsozialistischem Geiste" in Frankfurter Zeitung, Sept. 11, 1942; address of Thierack at Breslau as reported in News Digest #1026, B8; "Die Rechtserneuerung" in Muenchener Neueste Nachrichten, Feb. 12, 1943.

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of the party," which reverses the truth, and has pledged close collaboration between the administration of justice and the party and SS.(1) It was before the new appointments that instructions were issued for the exchange of information between the Sicherheitsdienst of the SS and the officials of justice.(2)

In fact, after six months in office, Thierack and Rothenberger have done little to achieve the complete Nazification of justice which their utterances promise and even less by way of departure from previous lines of development. The right of appeal has almost disappeared and the authority of the judge in a lower court to impose punishment has been increased.(3) These, however, only continue an earlier trend. Reports of convictions and sentences indicate that shorter shrift is now given to slackers, operators on the black market and other "enemies of the people" (Volksschädlinge). But this was already on the increase before Hitler spoke in April. Parenthetically it may be suggested that more severe treatment of malingerers may be welcome to those Germans who are already doing their duty at home or at the front. A recent article in Deutsche Justiz indicates that German justice is not yet considered stern enough in all districts and cases.(4)

Judicial independence has been under steady pressure since the Nazis assumed power in 1933. While answering foreign (and German ?) criticism of his authorization to "depart from

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(1) Address at Frankfurt in Frankfurter Zeitung, Dec. 12, 1942; News Digest #941, B (3), etc.
(2) "Sicherheitsdienst and Justiz" in Frankfurter Zeitung, Aug. 20, 1942.
(3) "Deutsche Justiz 1942", op. cit.
(4) Reported in News Digest #1049, B8.

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existing law," Thierack explicitly affirmed the subordination of judges to general ministerial directives:

> "The State leadership must lay down the general line for the judge to follow . . . That is the purpose among other things of the confidential 'letters for judges' (Richterbriefe) issued by me personally and sent to every German judge and prosecutor."

But Thierack accompanies this with a denial of intent to dictate decisions in particular cases: ". . . otherwise there would be nothing left of the judge."(1) In view of the reduction of party influence in the Ministry of Justice, this ministerial control may even imply protection of the judges against pressure from the party.

The only additional measures known to have been taken by Thierack are the appointment of Justices of the Peace in Baden and Wurttemberg, the establishment of three departments in the ministry to plan reform of the judiciary,(2) and energetic prosecution of the work on the new people's code of law (Volksgesetzbuch), with which the Academy for German Law has been occupied since 1933.(3)

It is evident that the reorganization in August aroused alarm among party members lest the NSDAP was losing control over the administration of justice, alarm which the slight progress of Thierack toward his professed goal has not allayed. Otherwise Thierack would hardly have thought it necessary to publish a leading article in the Völkischer Beobachter of February 8, 1943, which aims to quiet just such apprehensions. One passage from

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(1) Thierack quoted in Deutsche Justiz, Oct. 16, 1942, according to News Digest #1032, Supplement, p. 58.
(2) News Digest #1027, B2
(3) "Die Rechtserneuerung", op. cit.

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the article merits quotation as an illustration of the fog which shrouds the relations of party and state:

> "It is only superficially true that the entire leadership in legal affairs, so far as the sphere of justice is concerned, passed to the Reich Ministry of Justice, i.e. an agency of the state, after the dissolution of the Reich Legal Office of the NSDAP. The relations between party and state in the administration of justice are not a matter of organization and even less of the persons entrusted with it, but rather a matter of being eternally alive to the prøblems of completing and strengthening the folk-community. The Fuehrer has already stated at the party assembly of 1934 that the National Socialist party will endure as long as there is a National Socialist state and that so long as the National Socialist party exists, there can be nothing but a National Socialist state."

If the Nazis are troubled by recent developments in the administration of justice, there is concern also among the conservatives. Goering's paper, the National Zeitung of Essen, has been critical of innovations in training which are designed to add to the practical experience of judges.(1) The Koelnische Zeitung of December 12, 1942 enters a plea for legal security, objecting to the decision of a Saxon Court which gave more weight to the "sound opinion of the people" than to the clauses of a lease.(2)

In sum, the "crisis" in the German administration of justice has not yet been overcome. Circumstances forced Hitler in August to retreat from the extremisim of his April address and to compromise between his rádical followers and the surviving conservatives in ministry and judiciary. The compromise is visible in the discrepancy between the utterances of Thierack and Rothenberger and their actual measures to date. It is visible also in the signs of apprehension on both left and right. The

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(1) "Jurist und Fachmann" in Frankfurter Zeitung, Nov. 29, 1942.
(2) News Digest #1017, B5.

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administration of justice remains in a state of balance. It is, however, a precarious balance, which continues to tilt gradually to the left, and may be violently upset in the same direction, under the pressure of the war and the resultant strains within Germany.